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RUEHKO/AMEMBASSY TOKYO 2323
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RUEHGV/USMISSION GENEVA 2315
RUEAHL/DHS WASHDC
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RUEAWJA/DEPT OF JUSTICE WASHDC
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SENSITIVE
SIPDIS

State for EAP/CM - PPark and EB/IPE - DBubman
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State for EB/CIP - WWittman and RDaley
USTR for China Office - AWinter; IPR Office - RBae;
and OCG - SMcCoy; and JRagland
Commerce for National Coordinator for IPR
Enforcement
Commerce for MAC ESzymanski
Commerce for MAC SWilson, JYoung
LOC/Copyright Office - STEpp
USPTO for Int'l Affairs - LBoland, EWu, STong
DOJ for CCIPS - MDubose and SChembtob
FTC for Blumenthal
FBI for LBryant
DHS/ICE for IPR Center - DFaulconer, TRandazzo
DHS/CBP for IPR Rights Branch - GMacray, PPizzeck
ITC for LLevine, LSchlitt
State for White House OTP Ambassador Richard Russell

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SUBJECT: CHINA SUPREME COURT JUDGE REPORTED -
WITHOUT CORROBORATION - TO FAVOR PROTECTIONIST
MEASURES ALLOWING SELECTIVE ENFORCEMENT OF IPR

This cable is sensitive but unclassified and is not
for Internet distribution.

Summary

1. (SBU) According to one local media report, China Supreme People's Court (SPC) IP Judge Kong Xiangjun on December 10 said the SPC is studying "how to adjust patent, trademark and other IP judicial policies" to mitigate the effect of the global financial crisis on China's economy, and might introduce a new "public interest" test that does not require cessation of infringement as a remedy. Emboffs contacted Chen Shanzhe, the journalist originating the story, who admits to being unfamiliar with IPR issues and said he did not record his private conversation with Kong that followed a public press conference, the transcript of which appears inconsistent with Kong's story and shows strong statements by Kong favoring stricter IPR protection in China (though he did note an interest in protecting economic and social stability). In our initial contacts with working level IP officials, none were familiar with the press report and said they were unfamiliar with such a change in policy, but we will continue following up with agencies at higher levels for further clarification. End Summary.

Judge Reported to Favor Selective Enforcement

12. (SBU) Reporting on a December 10 press conference at China's Supreme People's Court (SPC) held to review "monthly action on strengthening judicial protection for IPR," the 21st Century Business Herald on December 11 said that the SPC is studying "how to adjust patent, trademark and other IP judicial policies" to mitigate the effect of the global financial crisis on Chinese companies. The potential adjustments reportedly cited by SPC IP Court Vice President Kong Xiangjun would introduce a new "public interest" test in the judiciary's remedy of IP infringement cases, and would require cessation of certain infringing activity only if it involved economic activities that "violated public interest." If the public interest is not violated, reports said, the infringer would be allowed to continue the infringing activity, but be required to pay damages to the right holder.

13. (SBU) The judge is reported to have used two examples to illustrate the new policy. In the first, a company that is building a bridge and is discovered to be using an infringing design should be allowed to pay a fine and continue construction. In the second, shooting of a television drama based on an infringing screenplay should be allowed to continue once a fine is paid. In both examples,

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Kong reportedly suggested that continuing the economic activities are in the public interest and should not be ceased.

14. (SBU) The news report said the new policy would be a departure from current Chinese requirements to cease all infringing activity, but claimed it would be consistent with other opinions issued by the SPC on December 4 that protect the nation's "financial security". The December 4 document is entitled "Opinions on the Provision of Judicial Support and Legal Services for the Safeguard of National Financial Security and Comprehensive, Coordinated and Sustainable Economic Growth."

Supreme Court, IP Agency Unaware of Comments

15. (SBU) Officials at China's State Intellectual Property Office (SIPO) told Embassies they were unaware of the article and statements made by Judge Kong, and that, to their knowledge, China's policy on the protection of IPR has not changed. SIPO officials suggested that the journalist's reporting perhaps did not accurately reflect the judge's statements. They also requested a copy of the article for their review and comment. SPC Foreign Affairs Division Director Liu Ming also told Embassy he was unaware of the news story or of such a change in policy, and asked for a copy of it before he could comment. Liu did say that SPC would be willing to meet with Embassy officials to discuss the matter, and suggested a meeting with the SPC IP Court. (Note: The IP Division, not the Foreign Affairs Division, would have close involvement in such a change in policy, but were not reached on December 12.)

16. (SBU) Embassies also contacted Chen Shanzhe, the 21st Century Business Herald reporter credited with the original story. Chen explained that the story came from his private conversation with Judge Kong following the December 10 press conference. Chen

admitted being unfamiliar with IP issues, but reconfirmed that the examples used in the story were offered by Kong. However, Chen said he did not record his conversation with the judge, could not independently verify the information, and asked Emboffs not to contact the SPC directly.

Contradictory Reports

¶7. (SBU) A separate media report by Xinhua, China's newswire service, offers a report quite contradictory to Chen's story and in line with Embassy's initial review of the event transcript. Xinhua credits Kong with telling local courts to be stricter on IPR infringers, and that courts should implement strict rules that deprive IPR violators of

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all illegal profits and legal costs of the victim. The transcript does show that Kong refers to "protect[ing] the public interest and safeguard[ing] the survival of enterprises and social stability," but he also says the court "should properly apply the legal obligations of IP infringement cessation according to the law."

¶8. (SBU) Emboffs are working to translate in full the Chinese transcript of the press conference and related news articles that reference Judge Kong's December 10 statements. We will also continue to seek clarification from the Chinese Government.

Comment

¶9. (SBU) If the 21st Century Business Herald story is true, the new policy would represent a radical departure from law and a disturbing setback to judicial protection of IP rights in China. However, without any independent corroboration of the reporter's interview, we will need to get more clarification on the facts before considering whether to lodge an official protest with the government. End Comment.